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JUN 9 1955
HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 136

CHARLIE SOPER AND JACK MEASE,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Petition for Writ of Certiorari	1
Opinion and Judgment Below	1
Jurisdiction	2
Statutes	2
Issues Presented	2
Statement	3
Points and Authorities Relied Upon for Granting the Writ	4
Argument	10
Conclusion	12
Appendix "A"	13
Appendix "B"	14

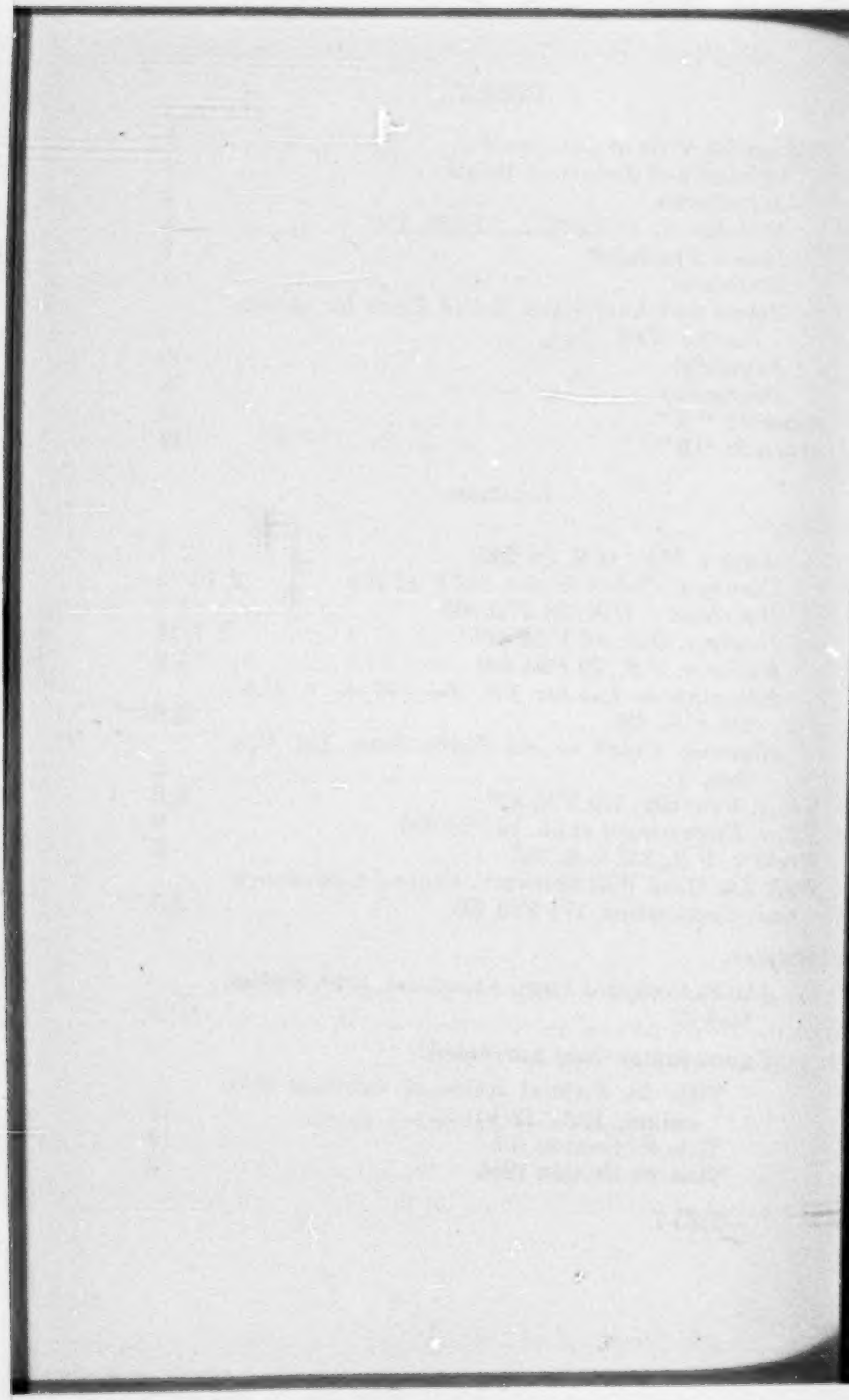
CITATIONS

Cases:

Amos v. *U.S.*, 41 S. Ct. 266	2, 7
Carney v. *United States*, 163 F 2d 784	2, 10, 12
Distefano v. *U.S.*, 58 F2d 963	2, 5
Doudy v. *U.S.*, 46 F.2d 417	2, 7, 11
Kutler v. *U.S.*, 79 F2d 440	2, 8
Silverthorne Lumber Co., Inc., et al. v. *U.S.*, 251 U.S. 385	2, 6
Supreme Court in Ex Parte Bain, 121 U.S. Rep. 1	2
U.S. v. *Donnelly*, 179 F2d 227	2, 6
U.S. v. *Eisenminger et al.*, 16 F2d 816	9
Weeks v. *U.S.*, 232 U.S. 383	6
WJR The Good Will Station v. *Federal Communications Commission*, 174 F2d 226	2, 5

Statutes:

Alaska Compiled Laws Annotated, 1949, Section 65-4-22	3, 13
United States Code Annotated:	
Title 18, Federal Rules of Criminal Procedure, Rule 12(b)(2)	11
Title 48, Section 101	13
Title 28, Section 1254	2



SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause, affirming the Judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, Number 14,312.

Opinion and Judgment Below

The Judgment of the Court of Appeals affirming the Judgment of the District Court for the Territory of Alaska,

Fourth Judicial Division, was entered on the 8th day of March, 1955, and Petition for Rehearing was denied on May 10, 1955, and said cause has not been reported as counsel believes.

Jurisdiction

Jurisdiction of this Court is invoked under 4th, 5th, 6th and 14th Amendments of the Constitution of the United States, denying to the petitioners unreasonable seizures and due process of law.

The District Court refused to hear the then defendants' Motion to Dismiss the Indictment.

The decision of the Court of Appeals for the Ninth Circuit in this case is in direct conflict with decisions of other Circuit Courts of Appeal, namely: *WJR The Good Will Station* v. *Federal Communications Commission,* 174 F2d 226; *Doudy* v. *U.S.,* 46 F2d 417; *Distefano* v. *U.S.,* 58 F2d 963; *U.S.* v. *Donnelly,* 179 F2d 227 and *Kutler* v. *U.S.,* 79 F2d 440.

The decision of said Court conflicts with its own decision in *Carney* v. *United States,* 163 F2d 784.

The decision is based upon conflict with decisions of the *Supreme Court in Ex Parte Bain,* 121 U.S. Rep. 1; *Silverthorne Lumber Co., Inc., et al.* v. *U.S.,* 251 U.S. 385 and *Amos* v. *U.S.,* 41 S. Ct. 266.

Jurisdiction is also invoked under *Title 28 U.S.C.A., Section 1254.*

Statutes

Cited in (Appendix) "A"

Issues Presented

The Indictment in the District Court charged:

That Charlie Soper and Jack Mease, on the 4th day of October, 1953, in Fairbanks Precinct, Fourth Judicial Divi-

sion, Territory of Alaska, then and there being, and being then and there armed with a dangerous weapon, to-wit, a loaded automatic M-1 rifle, feloniously assaulted Sylvester Johnson by pointing said weapon at and toward the said Sylvester Johnson at the residence of Mildred Young at 617 12th Avenue, in the Town of Fairbanks, Alaska, in violation of *Section 65-4-22* of the *Alaska Compiled Laws Annotated, 1949.*

The second count in the Indictment is the same except the name of Mildred Young is substituted for that of Sylvester Johnson.

The Court erred in overruling the then defendants' Motion to Dismiss the Indictment.

The Court erred in allowing testimony regarding the gun after the same was suppressed from evidence.

The Court erred in amending the Indictment to conform to the proof, or in an attempt to conform the Indictment to the proof.

Statement

The petitioners, Charlie Soper and Jack Mease, were convicted of the crime of assault with a dangerous weapon. (*Sec. 65-4-22, Alaska Compiled Laws Annotated, 1949*) see appendix.

Upon Motion of the then defendants, the gun described in the Indictment was suppressed as evidence as being a different gun than that described in the Indictment.

A Motion was then made to dismiss the Indictment which the lower Court denied without allowing counsel opportunity for oral argument.

It was established in the first Motion that the gun alleged to have been involved was an M-2 Carbine and not an M-1 automatic Rifle as described in the Indictment, there being no such gun as that described in the Indictment.

Over objections of counsel, which were not too well made, the District Court allowed all testimony to be presented to the jury regarding the gun, notwithstanding its being suppressed from evidence.

At the close of the Government's case and again at the close of the then defendants' case, argument was made for Judgment of Acquittal, which Motions were denied.

The Court thereupon instructed the jury to find the defendants guilty if they were satisfied that defendants had used a "loaded rifle". The Court further instructed that the Indictment was amended and should be considered as if it had never contained the words and figures "M-1".

The jury found the then defendants guilty on both counts of the Indictment and they were sentenced to eighteen months on each count to run concurrently.

From this Judgment appeal was had to the United States Court of Appeals for the Ninth Circuit, which Court entered its opinion affirming the Judgment of the lower Court on the 8th day of March, 1955, and denied a petition for rehearing on May 10, 1955.

The opinion of counsel is that the Circuit Court attacked the weaker points of the defendants' brief on appeal and glossed over the major portions without due consideration, hence this petition.

Points and Authorities Relied Upon For Granting the Writ

1. The Court erred in overruling the Motion to Dismiss the Indictment.

After the Court suppressed the gun involved from evidence on the ground it was not the one described in the Indictment and the fact was established that the gun seized was an "M-2" carbine and not an "M-1" rifle as named, the Court should have dismissed the Indictment leaving

the way open for a new and proper Indictment to be had by the Grand Jury.

The fact that the lower Court did not read the Motion to Dismiss the Indictment and denied the Motion without allowing counsel to be heard deprived defendants of their constitutional right to be heard. It is stated in *WJR, The Good Will Station* v. *Federal Communications Commission,* 174 F2d 226, in part:

> "Due process of law as guaranteed by the Fifth Amendment, requires hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders".

Counsel holds a Motion to Dismiss an Indictment is not interlocutory but as if on demurrer.

2. The Court erred in allowing testimony regarding the gun involved after that gun had been suppressed as evidence.

On this point the whole case turned and the Appellate Court chose to barely notice this portion as briefed by the appellants.

What benefit is a law which after allowing suppression of evidence, then permits unlimited testimony regarding the suppressed gun which the lower Court had ordered returned to the then defendants?

In *Distefano* v. *U. S.,* 58 F. 2d 963, (9):

> "After Court improperly denied Motion to Suppress evidence obtained by a search warrant, overruling objection to introduction of testimony based on search and seizure held error".

And again in *U. S.* v. *Donnelly*, 179 F. 2d 227, (3):

> "Guns and ammunition, if obtained by unlawful search and seizure when seized by federal arresting officers, could not be used for any purpose in prosecution for armed robbery". 251 U.S. 385.

Mr. Justice Holmes stated clearly in *Silverthorne Lumber Co., Inc., et al.* v. *U. S.*, 251 U.S. 385 at page 391:

> "This proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution cover the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States*, 232 U.S. 383, to be sure, had established that laying the papers directly before the Grand Jury was unwarranted, but it is taken to mean that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words *232 U.S. 393*. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.* Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed". (Emphasis ours.)

The holdings are similar in *Amos* v. *U. S.*, 255 U.S. 313, 41 S. Ct. 266 with reference to excluding property and testimony concerning it.

Petitioners realize that the objections to testimony concerning the excluded gun in the lower Court were not as precise nor proper as they could have been. This was called to the attention of the Appeals Court which in its opinion gave appellants no consideration on this point.

The trial Court was fully apprised of the defendants' objections as the transcript shows. We believe the trial Court should have barred the line of testimony regarding the suppressed gun even though the objections were not in technical form.

It is stated in *Doudy* v. *U. S.*, 46 F. 2d 417 (24):

> "Where the government was distinctly apprised of defendants' objections to a certain class of testimony, defendants were not required to object repeatedly to every specific statement".

And in part at *page 426* (24):

> "* * * it is true that the record does not disclose that the error in the admission of this testimony of Trexler's was pointed out as clearly and distinctly to the trial judge as it might have been; but we think when the whole record is considered, it will be seen that both the counsel for the government and the trial judge were sufficiently apprised that the defendant Funk was objecting to this class of testimony and relying upon his objections. * * * "

3. The trial Court erred in amending the Indictment to conform to the proof or in an attempt to conform the Indictment to the evidence.

The "M-1" rifle named in the Indictment had been suppressed prior to trial. After allowing evidence concerning the gun the trial Court instructed the jury that the "words and figures 'M-1' in Counts I and II of said Indictment have been eliminated and you, the jury, should consider said Counts I and II as if they had never contained the said words and figures 'M-1' ". And the trial Court further instructed the jury to consider Count I and II as amended.

Ex Parte Bain, 121 U.S. Rept. 17, Page 1 (Syl):

> "When this Indictment is filed with the Court no change can be made in the body of the instrument by order of the Court, or by the prosecuting attorney, without a re-submission to the grand jury. And the fact that the Court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument then changed, is no longer the Indictment of the grand jury which presented it".

As to descriptive matter in the Indictment we cite: *Kutler* v. *U. S.*, —— F. 2d 441 (5):

> "Generally, allegation which describes, defines, qualifies, or limits matter material to be charged in Indictment is taken as descriptive averment and must be proved as laid, notwithstanding such particularity of description was unnecessary. Trice *v.* State, 42 S.E. 1008; U. S. *v.* Howard, 26 Fed. Case 388, No. 15,403; State *v.* Lashus, 67 Me. 564; Commonwealth *v.* Dejardin, 30 Am. Rep. 652."

In the case cited, the word "receiver" described John M. Hill and such a description is essential. It was accordingly necessary for the government to prove it, but the

evidence showed that the description was false and the variance was fatal.

It follows that the judgment must be reversed.

United States v. *Eisenminger et al.*, 16 F2d 816, page 820 (12):

> "Undoubtedly there is a general rule of law that all unnecessary words may be rejected as surplusage, if the Indictment would be good upon striking them out. But that ruse is not an unqualified one. An interwoven limitation upon the operation of that principle is that, if the immaterial averments are in any sense descriptive of the identity of what is essential, then they cannot be rejected as surplusage. Wharton's Criminal Evidence Section 138. In U. S. *v.* Howard, Fed. Cas. No. 15,403, Mr. Justice Story said: '* * * No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the Indictment, can ever be rejected as surplusage.'
>
> This limitation to the general rule is well illustration by State *v.* Norkewicz, 3 Pennewill (Del.) 299, 51A601. There the Indictment was for the embezzlement of money. The statute provided (Rev. Code 1952, c. 153, Section 1):
>
> 'It shall be sufficient to allege the embezzlement to be of money without specifying any particular coin, or notes circulating as money * * *'. The kind of money embezzled was stated in the Indictment but not proved at the trial. Upon Motion for a directed verdict, the Court held that, the kind of money having been specified, it became a material part of the averment, could not be rejected as surplusage, but must be proved as laid, and directed a verdict for the de-

fendant. The object of an alleged conspiracy is that which identifies and describes the particular unlawful agreement or conspiracy with which the defendant stands charged. No part of that description may be ignored as surplusage. It must be proved as laid. Rabens *v.* United States, 146 F. 978 (C.C.A. 4)."

In *Carney* v. *U. S.*, 9 Cir., 163 F2d 784, the first count in the Indictment alleged that the defendants had forged and counterfeited "K-14th" gasoline ration coupons. Since there was no such thing as a genuine "K-14th" gasoline ration coupon, the first count failed to charge an offense. At the trial, with the consent of defendants, the first count was amended by changing "K-14th" to "A-14th", thus making it an offense, in the language of the Appeal Court.

The Appellate Court held that there was no such amendment in this case for which certiorari is sought and that the gist of the change was a "loaded automatic rifle" and the description "M-1" was surplusage. The Appellate Court held that the expression "M-1" was surplusage.

It appears this varies with the decision in the *Carney* case (*supra*) in which by the Court's later reasoning the gist of the offense would be the forging of gasoline ration coupons and the words and figures "K-14th" could have been surplusage if their decision in the instant case is correct.

Argument

Based upon the foregoing and the transcript in this case, counsel believes in the first instance the Indictment should have been dismissed after the evidence had been suppressed. Failure of the Trial Court to hear the then defendants' counsel on the written Motion to Dismiss the Indictment filed at the earliest moment possible after the suppression of evidence was granted, constituted a deprivation of the accused's right under the Fifth Amendment.

The Ninth Circuit Court held in its opinion that the Motion to Dismiss the Indictment was not made before trial and not in the time and manner required by Rule 12(b)(2) Federal Rules of Criminal Procedure, 18 U.S.C.A.

A Motion to Suppress Evidence was filed in the lower Court before trial and at (Tr. 48) the government's attorney asked permission and was granted the right for the jury to be picked before the Motion to Suppress was argued.

The jury was then empaneled and sworn (Tr. 49) and excused until 2 P.M. Argument had upon the Motion to Suppress, which Motion was granted (Tr. 62).

The then defendants at the earliest moment possible filed a Motion to Dismiss the Indictment (Tr. 63) which was summarily denied by the Court. The Motion could not have been made sooner as there appeared no ground for such a Motion until after the evidence was ordered suppressed.

To deny the petitioners a hearing on the Motion, under these circumstances would indeed be a harsh application of Rule 12 (b)(2) F.R.C.P.

On the second point the Trial Court allowing testimony to be given regarding the gun theretofore suppressed from evidence deprived the then defendants from the protection of the Fourth Amendment. Certainly no advantage is given accused by suppressing evidence illegally obtained and then permitting secondary evidence of it which is equally as strong. While the objections of counsel were weak, the Trial Court well knew that counsel was endeavoring to keep out testimony related to the suppressed evidence. The Appellate Court in its opinion held that no objections were actually made. This opinion is not in accord with *Doudy* v. *U. S.*, 46 F. 2d 417 (*supra*).

The final point is the question whether or not the Trial Court amended the Indictment. True, a pen was not taken

to strike words from the Indictment. It was done more effectively by instructing the jury that the words and figures "M-1" have been eliminated and that they were to consider the Indictment "as amended".

The Appellate Court in III of its opinion stated that a loaded automatic rifle is a dangerous weapon, regardless of whether it is or is not an "M-1" rifle. We agree in substance, but referring again to *Carney* v. *United States*, 9 Cir., 163 F. 2d 784 (*supra*) the reasoning of the Appellate Court is different. If they had applied the same reasoning to the instant case, the Carney case would have held that certain gasoline ration coupons had been forged and counterfeited, regardless of whether or not they were "K-14th" coupons.

We believe there is a substantial variance between the opinion of the Appellate Court and those of other Circuit Courts and the Supreme Court in regard to all three points raised by petitioners. We further believe the Trial Court and Appellate Court have deprived petitioners of substantial rights under the 4th, 5th and 14th Amendments.

Based upon the foregoing, the transcript, and petitioners' Brief therein, the Judgment of the Trial Court should have been reversed by the Ninth Circuit Court of Appeals.

Conclusion

For the reasons stated, the petition for a Writ of Certiorari should be granted.

Dated at Fairbanks, Alaska, this 31st day of May, 1955.

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APPENDIX "A"

STATUTES

48 U.S.C.A. Section 101. District Court; Judges; Divisions.

There is established a district Court for the District of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; * * *

65-4-22 Alaska Compiled Laws Annotated, 1949.

Assault with dangerous weapon. That whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the County Jail not more than one year nor less than one month, or by fine not less than one hundred dollars nor more than one thousand dollars.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,312

Mar. 8, 1955

CHARLIE SOPER and JACK MEASE, APPELLANTS,

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court for the Territory of Alaska, Fourth Division.

Before MATHEWS, HEALY and BONE, Circuit Judges.

MATHEWS, Circuit Judge.

On November 17, 1953, appellants, Charlie Soper and Jack Mease, were indicted in two counts. Count 1 alleged: "That [appellants], on the 4th day of October, 1953, in Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, then and there being, and being then and there armed with a dangerous weapon, to wit, a loaded automatic M-1 rifle, feloniously assaulted Sylvester Johnson at the residence of Mildred Young at 617-12th Avenue, in the Town of Fairbanks, Alaska, in violation of Section 65-4-22 of the Alaska Compiled Laws Annotated, 1949."[1] Count 2

[1] Section 65-4-22 provides: "That whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the county jail not more than one year nor less than one month, or by fine not less than one hundred dollars nor more than one thousand dollars."

was similar to count 1 except that, in count 2, the person alleged to have been assaulted was Mildred Young, instead of Sylvester Johnson. Appellants pleaded not guilty on November 23, 1953, had a jury trial on January 4, 5 and 6, 1954, and were found guilty on both counts. Thereupon a judgment was entered sentencing appellants to be imprisoned for 18 months. This appeal is from that judgment.

I

On January 4, 1954—after the trial was commenced and after the jury was impaneled—a motion to dismiss the indictment was made by appellants and was denied. Appellants contend that the denial was error.

The stated grounds of the motion were, in substance, that the names of all the witnesses who appeared before the grand jury for the purpose of procuring the indictment were not endorsed thereon;[2] that the United States Attorney who appeared before the grand jury was prejudiced against appellant Soper; that a weapon other than the weapon mentioned in the indictment was presented to the grand

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[2] Actually, the names of two witnesses were endorsed on the indictment. However, the names of witnesses are not required to be endorsed on any indictment in the District Court for the Territory of Alaska. Such indictments need only conform to the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. The indictment in this case did so conform. It should be noted and remembered that the Federal Rules of Criminal Procedure are now, and have been since October 20, 1949, applicable to all criminal proceedings in the District Court for the Territory of Alaska. See Rule 54(a)(1) of said rules, as amended by the Supreme Courts order of December 28, 1948, 335 U.S. 953, 954, effective October 20, 1949. Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated, 1949, cited by appellants, became inoperative on October 20, 1949, and remain inoperative.

jury for the purpose of obtaining the indictment;[3] and that therefore the indictment was illegally obtained.[4]

Thus, by the motion, appellants raised objections based on supposed defects in the indictment other than that it failed to show jurisdiction in the District Court or to charge an offense.[5] However, the objections so raised were not raised or presented before trial. Appellants' failure to present them before trial constituted a waiver thereof.[6] Relief from the waiver was not sought or granted.[7] We therefore hold that the motion was properly denied.

We further hold that the motion did not state any fact or facts warranting dismissal of the indictment, and that therefore the District Court would have been obliged to deny the motion, even if it had been made before trial—which it was not.

II

Appellants contend that the District Court erred "in overruling [appellants'] objections to testimony relative

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[3] The motion was not verified. Appellants did not prove or attempt to prove, nor does the record show, that any witness other than those whose names were endorsed on the indictment appeared before the grand jury for the purpose of procuring the indictment; or that the United States Attorney was prejudiced against appellant Soper; or that a weapon other than the weapon mentioned in the indictment was presented to the grand jury.

[4] The statement that the indictment was illegally obtained was, of course, a mere statement of a conclusion.

[5] It was never claimed or contended that the indictment failed to show jurisdiction in the District Court or to charge an offense.

[6] Rule 12(b)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides: "Defenses and objections based on defects * * * in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. * * *"

[7] See Rule 12(b)(2), supra.

to the gun alleged to have been involved." Actually, the District Court did not overrule any objection of appellants to any testimony relative to a gun, except as indicated below.

Johnson, called as a witness for the Government, testified, without objection, that he was at Young's residence in Fairbanks, Alaska, on the evening of October 4, 1954, and the early morning of October 5, 1954; that appellants came to Young's residence about 12:30 A.M. on October 5, 1954; and that—

"[Appellant Soper] sat next to me on the davenport. [Appellant Mease] sat in a chair that was next to a door that was leading into the kitchen.[8] * * * Well, we sat there and talked just like we have always done, kidded back and forth, and then [Mease] got up and said he was going to go out to the jeep[9] and get something he had forgotten, he would be right back. Then Soper got up and started pulling me by the shirt and says, "Come on, we are going out for a drink." I said, "No, I'm not drinking." He insisted and proceeded to get angry. About that time Mease came in the back door,[10] had his hand behind him. I started to get up because my shirt was being torn. About that time [Mease] pulled this gun[11] from behind him, told me to sit down or he would shoot me, so I sat down, and at that time [Soper] began to hit me."

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[8] Meaning the kitchen of Young's residence.

[9] A vehicle belonging to Mease.

[10] The back door of Young's residence.

[11] Other testimony showed that this was a loaded automatic rifle; that Mease pointed the rifle at Johnson and at Young; that Soper beat Johnson and Young while Mease held the rifle on them; that Mease then handed the rifle to Soper; and that Mease beat Johnson and Young while Soper held the rifle. Thus the testimony showed that appellants aided and abetted each other in committing these assaults, and that therefore both were principals therein. See 18 U.S.C.A. § 2(a); Alaska Compiled Laws Annotated, 1949, § 65-3-2.

Thereupon counsel for appellants moved "that this testimony be stricken regarding the gun unless the gun is presented." Treating the motion as an objection,[12] as well as a motion, the District Court overruled the objection and denied the motion. Both rulings were correct. Appellants' notion that Johnson's testimony regarding the gun was inadmissible unless and until the gun was "presented" was baseless and untenable.

III

At the close of all the evidence, a motion for a judgment of acquittal was made by appellants and was denied. Appellants contend that the denial was error.

The stated ground of the motion was, in substance, that the evidence was insufficient to sustain a conviction of appellants, or either of them, on either count of the indictment. Actually, there was substantial evidence that on the evening of October 4, 1954, or the early morning of October 5, 1954, at Young's residence in Fairbanks, Alaska, appellants, being then and there armed with a dangerous weapon, namely, a loaded automatic rifle, committed two assaults with the rifle—one by pointing it at and toward Johnson and one by pointing it at and toward Young.[13] We therefore hold that the evidence was sufficient to sustain a conviction of appellants on both counts of the indictment, and that the motion was properly denied.

There was, indeed, no evidence that the loaded automatic rifle with which the assaults were committed was an "M-1" rifle, but that is immaterial. A loaded automatic rifle is a dangerous weapon, regardless of whether it is or is not an "M-1" rifle. It is true that the rifle with which the assaults

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[12] Actually, there was no objection.

[13] See foonote 11.

were committed was described in the indictment as an "M-1" rifle. However, the expression "M-1" was surplusage [14] which—since appellants were not prejudiced thereby—could be disregarded. [15] Therefore proof that the rifle with which the assaults were committed was an "M-1" rifle was unnecessary.

IV

The District Court instructed the jury as follows: "* * * the words and figures 'M-1' in counts 1 and 2 of said indictment have been eliminated, [16] and you, the jury, should consider said counts 1 and 2 as if they had never contained the said words and figures 'M-1.' " Appellants contend that, in giving this instruction—which they say was an "amendment" of the indictment—the District Court erred. Actually, this instruction was nothing more than a direction to the jury to disregard the expression "M-1" in the indictment. As we have heretofore held, that expression was non-prejudicial surplusage. There was, therefore, no error in directing the jury to disregard it. [17]

In Carney v. United States, 9 Cir., 163 F. 2d 784, cited by appellants, the defendants were convicted on both counts of a two-count indictment. The conviction on the first count was reversed because that count—which, as it came from the grand jury, did not charge an offense—was

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[14] Cf. Bayless v. United States, 9 Cir., 200 F. 2d 113.

[15] Ford v. United States, 273 U.S. 593; Farley v. United States, 9 Cir., 269 F. 721; Himmelfarb v. United States, 9 Cir., 175 F. 2d 924; Catrino v. United States, 9 Cir., 176 F. 2d 884; Bayless v. United States, supra; Coppola v. United States, 9 Cir., 217 F. 2d 155; 42 C.J.S., Indictments and Informations, § 155.

[16] Actually, the expression "M-1" was "eliminated" only in the sense that the jury was instructed to consider counts 1 and 2 as if they had never contained that expression. Nothing was erased or stricken from either count.

[17] See authorities cited in footnote 15.

amended at the trial so as to make it charge an offense.[18] In the case at bar there was no such amendment. Obviously, the Carney case is not in point here.

Other contentions of appellants are so obviously lacking in merit as not to require discussion.

Judgment affirmed.

(Endorsed:) Opinion. Filed Mar. 8, 1955.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,312.

CHARLIE SOPER AND JACK MEASE, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

Appeal from the District Court for the District of Alaska, Fourth Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Fourth Division, and was duly submitted.

On consideration whereof, it is now here ordered and ad-

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[18] Originally, the first count of the Carney indictment alleged that the defendants had forged and counterfeited "K-14" gasoline ration coupons. Since there was no such thing as a genuine "K-14th" gasoline ration coupon, the first count failed to charge an offense. At the trial, the first count was amended by changing "K-14th" to "A-14th," thus making it allege that the defendants had forged and counterfeited "A-14th" gasoline ration coupons, which was an offense.

judged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment, Filed and entered: March 8, 1955, PAUL P. O'BRIEN, *Clerk*.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, May 10, 1955.

Before: MATHEWS, HEALY AND BONE, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellants, filed May 6, 1955, and within time allowed by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

(2265-7)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Bain, Ex Parte, 121 U. S. 1	4
Carney v. *United States*, 163 F. 2d 784	5
Ford v. *United States*, 273 U.S. 593	5
Holt v. *United States*, 218 U. S. 245	6
United States v. *Lee*, 274 U. S. 559	4
Zap v. *United States*, 328 U. S. 624	4

Statute:

Alaska Compiled Laws Ann. (1949), Section 65-4-22	2, 5

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 136

CHARLIE SOPER AND JACK MEASE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14-20; R. 142-147) is reported at 220 F. 2d 158.

JURISDICTION

The judgment of the Court of Appeals was rendered on March 8, 1955 (Pet. 20-21; R. 148) and a petition for rehearing was denied on May 10, 1955 (Pet. 21; R. 149). The petition for a writ of certiorari was filed on June 9, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether suppression as evidence of a gun seized as a result of an illegal search prevents the admission of testimony relative to the use of the gun in the commission of the charged offense.

2. Whether the court committed reversible error when it instructed the jury to disregard the designation "M-1" in an indictment which charged assault with a dangerous weapon, "to wit, a loaded automatic M-1 rifle."

3. Whether the trial court properly denied petitioners' motion to dismiss the indictment.

STATUTE INVOLVED

The pertinent statute provides in part:

> Section 65-4-22, Alaska Compiled Laws Ann. (1949):
>
> Assault with dangerous weapon. That whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the county jail not more than one year nor less than one month, or by fine not less than one hundred dollars nor more than one thousand dollars.

STATEMENT

A two-count indictment filed in the United States District Court for the District of Alaska charged that petitioners being "armed with a dangerous weapon, to wit, a loaded automatic M-1 rifle, feloniously assaulted" Sylvester Johnson (count 1) and

Mildred Young (count 2) in violation of 65-4-22 Alaska Compiled Laws Ann. (1949) (R. 3-4). Following a jury trial they were found guilty on both counts (R. 32) and sentenced to concurrent terms of imprisonment for eighteen months (R. 36-37). On appeal, the judgment of conviction was affirmed (Pet. 20-21; R. 148).

Petitioners' pretrial motion to suppress as evidence an automatic M-2 carbine which was allegedly taken from petitioner Mease was granted on the ground that the warrant and the underlying affidavit covered the seizure of an "M-1 rifle" from petitioner Soper and not the automatic M-2 carbine which was taken from petitioner Mease (R. 5-8, 19, 62).

The evidence showed that on October 4, 1953, while Sylvester Johnson was visiting Mildred Young, a widow of about two weeks, petitioners came in and tried to get the two to go out with them (R. 64-66, 79-80, 84, 103, 117). When Mrs. Young and Johnson refused, Mease went to his car and returned with an automatic rifle (R. 66-67, 70, 81). Mease drew the gun on Johnson and both men beat him (R. 67-71, 81, 105-107). At the point of the gun, then held by Soper, petitioners forced the other two out of the house (R. 70, 82). Outside, when Mrs. Young started to scream, petitioner Soper hit her and either pointed the gun at her or tried to hit her with it, but she deflected its direction (R. 83). Mease took the gun away from Soper and tried to shoot Johnson who had broken away and run down the street (R. 83).

ARGUMENT

1. When Mr. Johnson and Mrs. Young testified to the fact that petitioners threatened them with a rifle, petitioners' counsel unsuccessfully objected to the admission of such testimony unless the weapon was presented in evidence (R. 67, 82). Petitioners now complain (Pet. 5) that the admission of such evidence violated the order of suppression. The short answer is that the exclusionary rule relates to the use of evidence obtained as a result of the search and seizure. Obviously, the testimony of Mrs. Young and Mr. Johnson relating to the gun was not in any way the result of the later search and seizure. See *Zap* v. *United States,* 328 U. S. 624, 629; *United States* v. *Lee,* 274 U. S. 559, 563.

2. Over petitioners' objection (R. 134-135), the court instructed the jury as follows (R. 22):

> The jury is further instructed that pursuant to the laws in force in Alaska, the words and figures "M-1" in Counts I and II of said Indictment have been eliminated and you, the jury, should consider said Counts I and II as if they had never contained the said words and figures "M-1."

Petitioners attack (Pet. 8) this instruction as an amendment of the indictment without a resubmission to the grand jury—a practice condemned by this Court in *Ex Parte Bain,* 121 U. S. 1, as to a change in substance. In this case, however, as the court below held (Pet. 18-19), the allegation that

the rifle was an M-1 was surplusage, since a loaded automatic rifle is a dangerous weapon regardless of whether it was or was not an M-1. The jury may properly be instructed to disregard surplus allegations. *Ford* v. *United States,* 273 U. S. 593.

Petitioner relies on cases to the effect that if immaterial averments are in any sense descriptive of the identity of what is essential they cannot be rejected as surplusage (Pet. 7-9). In this case the statute (Section 65-4-22, Alaska Compiled Laws Ann. (1949), under which the indictment was drawn requires only the use of a dangerous weapon. The description of the dangerous weapon as an automatic rifle was a sufficient specification of the nature of the weapon, so that its characterization as an M-1 was immaterial.[1]

3. The motion to suppress was granted on the morning of the first day of the trial (R. 48, 62). During the noon recess, petitioners filed a motion to dismiss the indictment, alleging that it had appeared from the hearing on the motion to suppress that the United States attorney was prejudiced against petitioner Soper at the time the indictment was returned by the grand jury, and that, inasmuch as the suppressed gun had been presented to the grand jury, the indictment was obtained by the use of illegal evidence (R. 19-20). The district

[1] In *Carney* v. *United States,* 163 F. 2d 784 (C.A. 9), relied upon by petitioners (Pet. 12), the descriptive phrase was considered essential to the offense charged. Aside from the fact that it is from the same circuit as the instant case, that decision is therefore not, in principle, in conflict with the decision below.

court summarily denied the motion (R. 63).

Petitioners complain that the court acted too summarily, without giving real consideration to the motion (Pet. 5, 11). It is clear, however, that more extended consideration would have availed petitioners nothing for the motion was insufficient on its face. An indictment will not be dismissed merely because some illegal evidence has formed the basis thereof. *Holt* v. *United States,* 218 U. S. 245. Here, the gun alone, without testimony by the persons assaulted, could not have formed the basis of an indictment. As to the allegation of prejudice by the United States attorney, apparently based on his statement during the motion to suppress that Soper had made an attack upon him (R. 54), there was no attempt to show that such alleged prejudice influenced the grand jury.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1955.

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